Supreme Court, U.S.
FILED
DEC 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-364

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

REPLY BRIEF OF PETITIONER'S IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, SD 57501-5090
Telephone: 605/773-3215
Counsel of Record

Glenn T. Freeman
Lucy E. Freeman
HCR 62, Box 108
Midland, SD 57552

Pro Se Respondents

Mark A. Moreno
Special Assistant
Attorney General
P. O. Box 1174
Pierre, SD 57501-1174
Telephone: (605)224-0461

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PRELIMNINARY STATEMENT

Throughout this brief, Petitioners will be referred to by name or collectively as Petitioners. Respondents will likewise be referred to by name or collectively as Freemans.

This brief shall address the contentions raised in the Freemans' Brief in Opposition to Petition for Writ of Certiorari dated November 15, 1986, and is being submitted

pursuant to Rule 22 of the Rules of the Supreme Court.

BRIEF COVER

The Freemans incorrectly state in the cover of their opposition brief that the instant certiorari petition is to the United States Court of Appeals for the District of Columbia Circuit instead of to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

The Freemans' restatement of the case is at times inaccurate and misleading.

Initially, the Freemans in the first full paragraph of page 6 of their opposition brief imply that one or more of the Petitioners contacted the news media concerning the July 30, 1982 rendezvous. To do so, is totally without factual foundation in the record and, more importantly, is contradicted by Glenn Freeman's own deposition testimony.

Furthermore, the Freemans, in the first full paragraph on page 9 of their opposition brief state that they consented to an inspection in 1982 because of "the adverse on-going publicity arising from the incident which was personally damaging [to the Freemans'] business experience and other considerations [and because of] being promised unbiased inspectors." The record, however, indicates that Glenn Freeman consented to an inspection when he was given assurances that he would get an "unbiased" inspector and for this reason alone. In any event, whether Glenn Freeman gave his consent for the reasons he now claims remains to be seen and must be decided, if at all, by finder of fact.

In the second paragraph on page 9, the Freemans assert that "Baker's written inspection report to Blair of 12 August, 1982, is inconsistent with his report of inspection made to the Freemans and

statements he made on the premises at the time of the inspection." This assertion is a misstatement of the record as is the assertion in the first full paragraph of page 11, that the inspectors, in 1984, never produced credentials which identified their employer.

Moreover, the Freemans' statement in the first full paragraph on page 13 of their opposition brief, that the District Court, on April 25, 1985, reversed its October 31, 1984 order denying summary judgment, is both misleading and erroneous. In its April 25, 1985 opinion granting summary judgment, the District Court observed as follows:

> The fact this Court, when the issue was put squarely before it and briefed, may have reached the conclusion, in October, 1984, that the state statutes were insufficiently drawn to authorize warrantless inspections, does not mean that the law was 'clearly established' for reasonable persons in Defendants' position at the times the acts alleged in the complaint were committed.

A-68-69.

REASONS FOR GRANTING THE WRIT

I

QUALIFIED IMMUNITY--FOURTH AMENDMENT ISSUE

At the outset, the Freemans in the first full paragraph of page 16 of their opposition brief misstate the issue raised by the Petitioners in connection with their qualified immunity -- Fourth Amendment argument. As indicated at page i of their Certiorari Petition, the Petitioners seek review of the issue of whether the court below erred in holding that the applicable law, in 1982 and 1984, was "clearly established" so that state officials could reasonably be said to have "known" that an administrative inspection of a licensed commercial establishment, conducted pursuant to a pervasive regulatory scheme, was constitutionally objectionable under the Fourth Amendment to the United States Constitution.

Petitioners reaffirm their argument at pages 11-16 of the Petition, that the Eighth Circuit panel opinion directly conflicts with this Court's teachings in United States v. Biswell, 406 U.S. 311 (1972). In Biswell, this Court upheld an inspection conducted pursuant to § 923(g) of the Gun Control Act of 1968 (18 U.S.C. § 921, et seq.) even though § 923(g) failed to define the frequency or scope of inspection, and in addition, failed to provide any means by which an establishment owner's Fourth Amendment interests could be accommodated. To say, as the Freemans do at pages 19-20 of their opposition brief, that § 923(g) was limited, specific and narrow is erroneous and contrary to any reasonable interpretation of the statute.[1] See Id. at 311-312, 316.

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[1]Notwithstanding Biswell, the Freemans can hardly complain about the certainty and regularity of inspections conducted under

(Footnote Continued)

Just as in Biswell, close scrutiny of public health and safety in campgrounds, restaurants and lodging establishments are undeniably of central importance to state (as well as federal) efforts at preventing health hazards and injuries. Large interests are at stake and inspection is a crucial part of the regulatory scheme, since it assures that the public is protected from disease and injury. It is plain that health and safety inspections of campgrounds, as well as restaurants and lodging establishments pose only limited threats to a licensee's justifiable expectations of privacy. When a person chooses to operate a pervasively

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(Footnote Continued)
§ 34-18-24 of the South Dakota Codified Laws. Prior to 1982, § 34-18-24 provided for "annual" inspections. S.D. Codified Laws Ann. § 34-18-24 (1970). See Supp. A-1. In 1982, the South Dakota legislature amended § 34-18-24 to provide for "periodic" inspections. 1982 S.D. Sess. Laws ch. 261 § 1; S.D. Codified Laws Ann. § 34-18-24 (1982). Glenn Freeman, as a legislator in 1982, voted in favor of the amendment.

regulated business such as a campground, motel or restaurant in South Dakota and to accept a state license, he does so with the knowledge that his business premises will be subject to health and safety inspections. Each licensee is furnished with a revised compilation of regulations that describe his obligations and define the inspector's authority so that he is not left to wonder about the purposes of the inspector or the limits of his task.[2] The licensee, therefore, has no "clearly established" light, in view of Biswell and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), to demand a warrant and as such, defeat a claim of qualified immunity. See Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct.

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[2]This is especially so where, as here, the licensee played a strong role in the drafting and passage of the statutes and regulations which make up the regulatory scheme.

2806 (1985); Davis V. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Contrary to the Freemans' contentions at pages 22-23 of their opposition brief, the applicable law in 1982 and 1984 was not "clearly established" so that the Petitioners could fairly be said to "know" that a warrant was constitutionally required prior to an inspection. Id. This Court has consistently observed for nearly two decades that warrantless administrative inspections of licensed commercial establishments, made pursuant to a regulatory scheme, are not necessarily violative of the Fourth Amendment and must be resolved on a case-by-case basis under the Fourth Amendment standard of "reasonableness" (i.e., by balancing the state's interests with that of the establishment owner). See v. City of Seattle, 387 U.S. 541, 546 (1967); Colonnade Catering Corp. v. United States, 397 U.S. at

76-77; Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978); Donovan v. Dewey, 452 U.S. 594, 598 (1981). Applying this balancing test of reasonableness, the Court has struck down various warrantless administrative inspection schemes, see e.g., See v. City of Seattle, supra; Marshall v. Barlow's, Inc., supra, and upheld others, see e.g., Colonnade Catering Corp. v. United States, supra; United States v. Biswell, supra; Donovan v. Dewey, supra.

The Freeman's claim that the cases cited at pages 24-26 of the Certiorari Petition are readily distinguishable from the instant case because they all involve "pervasive regulatory schemes carried out under statutes properly limiting the inspector's discretion, and protecting the private interests of the owners." In response, the Petitioners submit that the cases cited, including Marcowitz v. Dept. of Public Health, 106 Ill.App.3d 422, 435 N.E.2d 1291 (1982) are in conflict with

the panel opinion and are neither factually nor legally distinguishable from the case at hand.

The Freemans also claim that People v. Krull, No. 85-608 (certiorari granted March 24, 1986, argued, Nov. 5, 1986) (opinion below: Illinois v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985)), Anderson v. Creighton, No. 85-5020 (certiorari granted June 30, 1986) (opinion below: Anderson v. Creighton, 766 F.2d 1269 (8th Cir. 1985)), and New York v. Burger, No. 86-80 (certiorari granted October 6, 1986) (opinion below: People v. Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986)) are in apposite. A review of Krull, Creighton, Burger, New York State Restaurant Assn., Inc. v. City of New York, No. 86-581 (appeal filed October 8, 1986) (opinion below: New York State Restaurant Assn., Inc. v. City of New York, 500 N.Y.2d 224 (N.Y. App.Div. 1986)), and Patton v. Sourbeer, No. 86-419 (certiorari filed

September 12, 1986) (opinion below: Sourbeer v. Robinson, 791 F.2d 1094 (3d Cir. 1986), however, reveals that this Court could decide the qualified immunity--Fourth Amendment issue herein raised and is urged, as an alternative reason for granting the writ, to review the decision below for this purpose.[3]

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[3]It is significant to note that this Court granted review in Burger after the lower court opined that the warrantless administrative inspection of a junkyard violated an establishment owner's Fourth Amendment rights, but denied review in Lewis v. McMasters, No. 85-2005 (appeal filed March 24, 1986, appeal dismissed October 6, 1986) (opinion below: Ninth Circuit October 22, 1985) (unpublished)) in the same context after the lower court concluded that the inspection was not violative of the Fourth Amendment. By doing so, the Court has apparently expressed an interest in reviewing the propriety of warrantless administrative inspections of items and merchandise at junkyards and likewise should do the same with respect to health and safety matters at commercial campgrounds.

It should also be noted that the court could decide the qualified immunity--Due Process issue in Creighton and Patton, both of which are are both qualified immunity cases.

II

PARRATT/HUDSON--DUE PROCESS ISSUE

The Freemans contend that this Court's pronouncements in Pembauer v. City of Cincinnati, ___ U.S. ___, 106 S.Ct. 1292 (1986) control the due process issue at hand and that Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer 468 U.S. 517 (1984) have no application. Contrary to the Freemans' contention, Pembauer is in apposite and therefore not controlling here and in addition, was decided some four years after the initial events that gave rise to this action. Moreover, in light of Holloway v. Walker, 86-271 (certiorari filed August 21, 1986) (opinion below: Holloway v. Walker, 790 F.2d 1170 (5th Cir. 1986))[4] the propriety of

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[4]Interestingly, the Petition for Writ of Certiorari in Holloway was filed by Lawrence H. Tribe, the distinguished Harvard law professor, who has apparently undertaken to handle the case before this Court.

the Freemans' contention, as well as the panel opinion, that Parratt and Hudson only apply to low level state officials, is anything but clear. The Court is urged to grant review to resolve this question.

III

QUALIFIED IMMUNITY--DUE PROCESS ISSUE

The Freemans' claim that they have a "clearly established" right to a hearing before an interim license suspension could be imposed. A review of the applicable case law in 1982 and 1984, however, reveals that there was no "clearly established" right to a pre-deprivation hearing for interim license suspensions. See Hudson v. Palmer, supra; Parratt v. Taylor, supra; Barry v. Barchi, 443 U.S. 66 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

IV

ABSOLUTE IMMUNITY ISSUE

The Petitioners reaffirm their arguments at pages 37-43 of their Certiorari Petition and pause only to point out that the circumstances surrounding the 1982 and 1984 events and those which surround the Freemans in general, lend strong support to extending absolute immunity to Blair and Massa.[5]

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[5]This is particularly true here when one considers Glenn Freeman's public attacks against state government and state officials, his litigation record against the state, state officials and private businesses, and his efforts to condemn an inspection scheme, which he voted to amend, only nine months after the amended scheme became effective.

CONCLUSION

For these reasons, the Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Dated this 8th day of December, 1986.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL
State of South Dakota
State Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215
Counsel of Record

Mark A. Moreno
Special Assistant
Attorney General
P. O. Box 1174
Pierre, SD 57501-1174
Telephone: (605) 224-0461

SUPPLEMENTAL JOINT APPENDIX

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S.D. Codified Laws Ann. § 34-18-24 (1970).

34-18-24. The secretary of health shall inspect or cause to be inspected every lodging establishment and campground operating within the state for compliance with the provisions of this chapter and the rules and regulations of the department at least annually and in addition thereto may make other inspections as deemed necessary.